In the United States Court of Appeals
for the Ninth Circuit

No. 19868

QUINAULT TRIBE OF INDIANS, et al., Appellants,

v.

A. M. GALLAGHER, et al., Appellees.

APPELLANTS' REPLY TO BRIEF OF THE UNITED STATES, AMICUS CURIAE

Charles A. Hobbs
Attorney for Appellants
1616 H Street, N. W.
Washington, D. C. 20006

WILKINSON, CRAGUN & BARKER
Jerry C. Straus

LESOURD & PATTEN

Gladys Phillips
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I. The District Court had federal question jurisdiction under the provisions of 28 U.S.C. 1331.

A. The amicus suggests (amicus brief, pp. 4-5) that ". . . the District Court had no authority to entertain the suit for lack of allegations [in the Complaint] supporting the bald allegation (Par. 1) that the 'matter in controversy exceeds the value of $10,000' . . ." Stated otherwise, the amicus argues that it was not enough for us to assert that the amount in controversy exceeded $10,000 but that we were required, in the Complaint, to provide detailed allegations to support our basic allegation.

The point is a technicality and in error to boot. We have made clear in detail how the $10,000

jurisdictional sum is derived,[1] and obviously we are prepared to prove these details at trial if the Court finds a trial necessary. Evidently, the amicus feels these details should have appeared in the Complaint, as a jurisdictional requirement. On the contrary, the simple allegation in the Complaint that the amount in controversy exceeds the jurisdictional amount is all that is required by the statute, as a glance at the Federal Rules of Civil Procedure, Appendix, Form 2, will confirm. See also Moore Federal Practice, 2-1668, 1-834.

There is nothing to the contrary in Giancana v. Johnson, 335 F.2d 366 (7th Cir. 1964), cert. den., 379 U.S. 1001.[2] Contrary to the amicus contention, the allegations in the complaint in the Giancana case were not similar to those in the instant case. In that case, as the Court stated, the complaint contained "no express allegation of the essential jurisdictional sum or value." (335 F.2d at 368) i.e., the complaint did not state that the amount in controversy exceeded $10,000. In the instant

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1. Plaintiffs' Opposition to Motion to Dismiss, District Court, Nov. 4, 1964, pp. 19-20; and Appellants' Reply Brief before this Court, June 7, 1965, pp. 7-11.

2. The amicus has cited a number of cases (Brf., p. 3) standing for the proposition that, no matter how important the question, federal question jurisdiction under 28 U.S.C. 1331 does not lie unless the plaintiff can show the presence of the jurisdictional amount in controversy. With this proposition we are in complete agreement.

case, as stated above, our Complaint made the necessary allegation.[3]

B. It is interesting to note that the amicus brief is silent on the point of whether our Complaint raised a substantial federal question - a point that has been vigorously disputed by the parties to this litigation.[4] We take this silence to signify that the amicus agrees with appellants on this point since every other point discussed in the amicus brief has taken a position contrary to that of the appellants. If this be the case, it seems to us that the amicus might have said so, and thus seemed a little less the advocate and a little more the friend of the Court.

II. The State of Washington's assumption of jurisdiction over the Quinault Tribe was unlawful.

A. In discussing the merits of appellants' case, the amicus brief begins by asserting (pp. 5-6) that it is for Congress rather than for the courts to

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3. The United States also makes the point (Brf., p. 5) that "the complaint does not allege any facts showing any actionable violation of civil rights such as would be sufficient to invoke the jurisdiction of the District Court under 28 U.S.C. 1343." We find this bald assertion, made without any further argument, puzzling, indeed. In our main brief, pp. 33-38, we very carefully pointed out why the District Court had jurisdiction under 28 U.S.C. 1343. Since the United States did not see fit to refute any of the arguments we made, we do not believe that its pronouncement on this matter is entitled to any weight.

4. See Appellees' Brief, pp. 5-14; Appellants' Reply Brief, pp. 1-7.

to determine when ". . . Indian tribes shall cease to be dependent and assume the responsibilities of citizenship."

This point is irrelevant to this case.[5/] Appellants have never contended that Congress lacked power to relinquish jurisdiction to the State of Washington. Appellants' contention is and has always been that the State of Washington failed to comply with the terms of Congress' offer to relinquish jurisdiction; thus its attempted assumption of jurisdiction over the Quinaults, and other Indian tribes in the State, was null and void.

The amicus brief then - after discussing the background of the passage of Public Law 280, and inaccurately reciting the history of the State's assumption of jurisdiction over the Quinaults[5a/] - goes on blandly to assert that

5. And rather presumptuous, considering the source. A more accurate way of stating it would be to say it is up to Congress to decide whether to cast the Indians adrift at a time when they are still not capable of achieving economic equality in the local non-Indian environment. The Indians regard State jurisdiction as a giant step toward loss of what remains of their reservation, of their tribal government, and of their sense of tribal identity.

5a. The amicus brief states that the Business Committee petitioned the Governor for state jurisdiction and that thereafter ". . . a dissident group of Quinault Indians claimed that the business committee was not properly clothed with authority to adopt the resolution. . . ." (p. 7). In point of fact the Business Committee, and this is alleged in our Complaint, acted against the will of the overwhelming majority of the Tribal Council (an assembly of the whole Tribe) which had given the Business Committee express instructions not to petition for state law and order. The so-called "dissident group" was (and is) in fact the overwhelming majority of the Tribe. These facts were recognized by the Governor in rescinding his proclamation (see our main brief, p. 6, note 2), and by the trial court in State v. Bertrand, 61 Wash.2d 333, 378 P.2d 427 (1963); the trial court was reversed, but on other grounds.

Public Law 280 did not direct the method by which the states could acquire civil and criminal jurisdiction over Indians but left that question entirely to the determination of each state, and that consequently whether a state has lawfully assumed jurisdiction under Public Law 280 is a question of state law. But Congress did direct the method by which certain states - those with constitutional disclaimers - could take jurisdiction. Section 6 of Public Law 280 expressly directed:

> ". . . That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be." 6/ (Emphasis supplied.)

The amicus brief (p. 8) points to the fact that whether states have the authority to prosecute Indians under state law is a question of state law, and that the construction of state law by the highest court of the state is binding on the federal courts. We do not disagree with these conclusions. There is a question of state law in this case, i.e., whether the Washington State assumption of jurisdiction complied with the provisions of the Washington State Constitution. On that question of state law the decision of the Washington State Supreme Court in State v. Paul, 53 Wash.2d 789, 337 P.2d 33 (1959) - although we believe it to be erroneous - is binding on federal courts.

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6. See discussion in our main brief, pp. 20-25.

What the amicus overlooks, however, is that the failure of the State of Washington to amend its Constitution raised not only a question of state law (whether the constitutional disclaimer could be ignored consistent with the State Constitution) but also a question of federal law (whether the constitutional disclaimer could be ignored consistent with Public Law 280). Under the plain language of Public Law 280, made even clearer by its legislative history,[7] Washington failed to satisfy the mandate of Public Law 280, and thus remained ineligible to assume jurisdiction. It is of no direct interest to us, or to this Court, whether the State court found that state law was satisfied.

B. We assert that, entirely aside from Public Law 280, the Federal Enabling Act that admitted the State of Washington into the Union required the Washington State Constitution to include a provision that ". . . Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . ."[8] and that this Constitution be ". . . irrevocable without the consent of the United States and the people of the said states. . . ." Therefore, we argue, the action of the Legislature of the State of Washington in assuming

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7. See Brf., pp. 20-25.

8. 25 Stat. 676, 677.

jurisdiction over Indian reservations without obtaining the consent of the people of the State to an amendment of the Constitution violated the provisions of the Enabling Act.[9/]

The amicus brief does not discuss our assertions that insofar as the Enabling Act prevented the State of Washington from assuming jurisdiction over Indian reservations, the consent of the people through constitutional amendment rather than action by the Legislature had to be obtained. Rather, the amicus brief (pp. 9-11) points out that "absolute" federal jurisdiction over Indian lands, as that phrase appears in several enabling acts, does not really mean exclusive federal jurisdiction, because the states do have jurisdiction on Indian reservations in certain cases. Amicus then (p. 11) sums up as follows (a passage we quote in full because we are not sure we understand it well enough to paraphrase):

> "In view of the rulings of the Supreme Court of the United States that the words 'absolute jurisdiction and control of the United States' in Washington's Enabling Act and other statehood laws do not mean that Indian lands are under the exclusive jurisdiction of the United States, it follows that there was no legal impediment in the same language as incorporated in Article XXVI of the State Constitution to Washington's assumption of the jurisdiction offered by Public Law 280 by legislative action, without prior amendment to Article XXVI. . . ."

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9. See discussion in main brief, pp. 25-30.

We agree that notwithstanding the "absolute" federal jurisdiction clauses in several enabling acts (such as Washington's), the states do have jurisdiction on Indian reservations in certain cases. However, it is important to note that those are all cases involving non-Indians. We are aware of no case which has held that a state has jurisdiction over an Indian on a reservation, unless Congress consented to it.[10]

Restating amicus' reasoning in more precise terms, then, it apparently comes to this: since the state has judicially recognized jurisdiction over non-Indians within Indian reservations, despite the fact that its Constitution recognizes "absolute" federal jurisdiction over such lands, therefore it follows that the state need not amend its Constitution in order to take jurisdiction over Indians within such lands. The fallacy is obvious - an exception to "absolute" federal jurisdiction on reservations with respect to non-Indians does not by any means authorize an exception with respect to Indians. After all,

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10. See Williams v. Lee, 358 U.S. 217, 221 (1959): ". . . when Congress has wished the States to exercise this power [criminal and civil jurisdiction within a reservation] it has expressly granted them the jurisdiction. . . ." In the Kake case cited by amicus, the question involved fishing rights not located within any reservation. Indeed, the Kake Indians had no reservation at all, so the essential question of state regulation of Indians within a reservation never arose. It did arise in a companion case, Metlakatla, 369 U.S. 45, which involved a reservation and reached the opposite result. The Court in Kake pointed out the fact that Metlakatla involved a reservation while Kake did not. (369 U.S. at 64.)

the exclusive federal jurisdiction which ever really matter historically is that over the Indians, not over non-Indians.[11/]

While the amicus may be technically correct in stating that the federal jurisdiction over the Quinault Reservation was not "exclusive" in its scope, this in no way validates the attempt of the State of Washington to take over that jurisdiction. Whatever the scope of federal jurisdiction on the Quinault reservation, the State could only take it over if it complied with the provisions of the Enabling Act and of Public Law 280.

The question in dispute in this case - and the question to which the parties have heretofore addressed themselves - is whether this "absolute" (though not exclusive) federal jurisdiction could be assumed

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11. See New York v. Martin, 326 U.S. 496, 501 (1946), in upholding state jurisdiction over a non-Indian on a reservation: ". . . Generally no emphasis has been placed on whether state or United States courts should try white offenders for conduct which happened to take place upon an Indian reservation, but which did not directly affect the Indians. . . ." See also, Utah & No. Ry. v. Fisher, 116 U.S. 28, 31-32 (1880).

by act of the Legislature, as contended by appellees, or, because of the requirements of two federal laws, Public Law 280 and the Enabling Act, only by action of the "people" through constitutional amendment.

C. The Kake case quoted by amicus refers to the Williams case, supra, which suggests still another factor of relevance here. In the Williams case the Supreme Court noted that the Navajo-United States relationship involved a treaty, and -

> ". . . Implicit in these treaty terms . . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." (358 U.S. at 221-222).

We suggest that the same understanding was clearly implicit in the Quinault Treaty of 1855, 12 Stat. 971.[12/] Of course, the Williams case did not involve Public Law 280, which if properly implemented by Washington, would have abrogated the implicit understanding in the Quinault Treaty. However, Williams does establish a presumption in favor of Indian self-government and makes it absolutely clear that states should not be allowed to ". . . infringe on the right of the Indians to govern themselves . . ." unless there has been an effective delegation of power to the states by the Congress. (358 U.S. at 223).

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12. See, e.g., the language of Article II: the reservation was to be set aside for the "exclusive" use of the Indians, ". . . and no white man shall be permitted to reside thereon [on the reservation] without permission of the tribe. . . ."

In the instant case, we have shown that no such delegation of authority to the State of Washington was effectively made by the Congress since the State of Washington did not comply with the provisions of Public Law 280 or of the Enabling Act.

If Congress meant what it said in Public Law 280, (i.e., ". . . That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be. . .") it follows that the Washington State assumption of jurisdiction was a nullity. Neither the appellees nor the amicus have offered any interpretation of Public Law 280 which would lead to a contrary result. Indeed, appellants' interpretation of this statute is the only tenable one, in light of the legislative history, and especially in light of the long-settled rule that treaties and statutes affecting the Indians should be construed in their favor.[13/]

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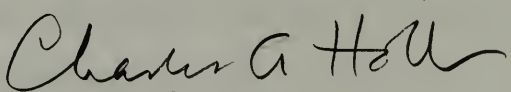
13. See, for example, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832); The Kansas Indians, 72 U.S. (5 Wall.) 737, 760 (1866); Choctaw Nation v. United States, 119 U.S. 1, 27-28 (1886); Jones v. Meehan, 175 U.S. 1, 11 (1899); United States v. Winans, 198 U.S. 371, 380 (1905); Winters v. United States, 207 U.S. 564, 576 (1908); Choate v. Trapp, 224 U.S. 665, 675 (1912); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918); Seufert Brothers Co. v. United States, 249 U.S. 194, 198 (1919); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Squire v. Capoeman, 351 U.S. 1, 7 (1956).

CONCLUSION

Appellants regret that righting the wrong done them by the State of Washington will require the State to start all over again in its efforts to take jurisdiction over Indian lands. On the other hand, what Congress required makes sense - such a far-reaching change in Indian-state relations should require constitutional authorization, particularly where the Constitution expressly forbids what the state has tried to do here.

WHEREFORE, the judgment of the District Court should be reversed, and the case remanded with instructions to grant the relief sought by appellants.

Respectfully submitted,



Charles A. Hobbs
Attorney for Appellants
1616 H Street, N. W.
Washington, D. C. 20006

WILKINSON, CRAGUN & BARKER
Jerry C. Straus

LESOURD & PATTEN

Gladys Phillips
Of Counsel

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply brief is in full compliance with those rules.

Charles A. Hobbs

CERTIFICATE OF SERVICE

Served this 27th day of May, 1966, by mailing a copy each of Appellants' Reply to Brief of the United States, Amicus Curiae, to the attorneys for appellees: Jane Dowdle Smith, Assistant Attorney General, Temple of Justice, Olympia, Washington, and L. Edward, Esquire, Prosecuting Attorney for Grays Harbor County, P. O. Box 529, Montesano, Washington.

Charles A. Hobbs